Nos. 08-289 & 08-294

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT, ARIZONA PUBLIC INSTRUCTION, SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, AND PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION, ARIZONA SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL EDUCATION ASSOCIATION, AND ARIZONA EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI CURIAE 1

INTRODUCTION 5

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. ARIZONA'S INADEQUATE FUNDING OF EDUCATIONAL PROGRAMS FOR ENGLISH LANGUAGE LEARNERS VIOLATES THE EEOA 9

A. Arizona Fails To Provide Local School Districts With The Resources Necessary For ELL Students To Overcome Language Barriers 9

B. Educational Research Supports The Ninth Circuit's Determination That Arizona's ELL Students Require Additional Resources 15

II. THE DECISION BELOW IS FULLY CONSISTENT WITH OUR NATION'S TRADITION OF LOCAL CONTROL OF PUBLIC EDUCATION 19

A. The Federal Courts' Longstanding Interpretation Of The EEOA Gives Local Authorities Ample Discretion 20

B. Arizona's Failure To Adequately Fund Its Chosen Method Of Education For ELL Students Makes A Mockery Of The Idea Of Local Control 22

TABLE OF CONTENTS—Continued

Page

C. The Federal Courts Have An Important Role In Protecting Meaningful Local Control 25

III. NCLB DID NOT REDUCE OR ABOLISH THE LEGAL PROTECTION THE EEOA AFFORDS TO ENGLISH LANGUAGE LEARNERS 27

A. NCLB And The EEOA Have Very Different Purposes 28

B. Nothing In The Text Or Legislative History Of NCLB Suggests It Was Intended To Amend Or Abolish The EEOA Or Disturb This Court's Ruling In *Lau* 32

C. Petitioners' Bizarre Interpretation Of NCLB Would Undermine The EEOA And This Court's Ruling In *Lau* 34

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES:

Alliance for Children v. *City of Detroit Pub. Sch.*, 475 F. Supp. 2d 655 (E.D. Mich. 2007)..... 30

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006)..... 3, 36

Ass'n of Cmty. Orgs. for Reform Now v. *New York City Dep't of Educ.*, 269 F. Supp. 2d 338 (E.D.N.Y. 2003) 30

Bd. of Educ. of Okla. City Pub. Sch. v. *Dowell*, 498 U.S. 237 (1991)..... 3

Bradley v. *Milliken*, 540 F.2d 229 (6th Cir. 1976) 35

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Cook County, Ill. v. *U.S. ex rel. Chandler*, 538 U.S. 119 (2003)..... 33

Dayton Bd. of Educ. v. *Brinkman*, 433 U.S. 406 (1977)..... 20

Fitzgerald v. *Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009)..... 3

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TABLE OF AUTHORITIES—Continued

Page

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Plyler v. *Doe*, 457 U.S. 202 (1982) 5

Schaffer v. *Weast*, 546 U.S. 49 (2005) 3, 36

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TABLE OF AUTHORITIES—Continued

Page

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United States v. *Texas*, 572 F. Supp. 2d 726 (E.D. Tex. 2008) 28

STATUTES:

20 U.S.C. §§ 1400, *et seq.* 35

20 U.S.C. § 1701 ..... passim

20 U.S.C. § 1703 ..... 9, 29

20 U.S.C. § 1706 ..... 9, 29

20 U.S.C. § 6314(a)(2)(B) 14

20 U.S.C. § 6623(b) 14

20 U.S.C. § 6812(8) 29

20 U.S.C. § 6821-26 30-31

20 U.S.C. § 6825(g) 14

20 U.S.C. § 6842 30-31

20 U.S.C. § 6847 33

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20 U.S.C. § 7902 ..... 14, 15

Ariz. Rev. Stat. § 15-751(5) 10

Ariz. Rev. Stat. § 15-756.11(E) 15

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TABLE OF AUTHORITIES—Continued

Page

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Tex. Educ. Code § 29.053 21

CONSTITUTIONAL PROVISION:

Ariz. Const. art. XI, § 1 24

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H.B. 2064 ..... 10, 12, 19

Hearing 107-479 Before the Sen. Comm. On Health, Education, Labor, and Pensions 9 (May 23, 2002) 27

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Fed. R. Civ. P. 60(b) 16, 19

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Sup. Ct. R. 37.3(a) 1

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Page

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Page

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

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[1] Pursuant to Sup. Ct. R. 37.3(a) counsel for *amici* states that the parties have consented to the filing of this brief. Pursuant to Sup. Ct. R. 37.6, counsel for *amici* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the board of education of the U.S. Virgin Islands. Together with these members, NSBA represents over 95,000 school board members who, in turn, govern over 14,000 local school districts that serve more than 49.8 million public school students—approximately 90 percent of the elementary and secondary students in the nation.

The Arizona School Boards Association ("ASBA") is one of the member associations that comprise NSBA. ASBA is a non-profit corporation providing assistance to the more than 240 Arizona school boards that are its members. ASBA serves 95 percent of Arizona's public school districts, and those districts serve over 1.12 million children.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children.

The National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the majority of whom are employed as teachers by public school districts, colleges, and universities.

The Arizona Education Association ("AEA") represents more than 30,000 public school educators and education support professionals throughout Arizor AEA members include teachers, counselors, speec.. ..thologists, and student teachers.

NSBA and the other *amici* regularly represent their members' interests before Congress and federal and state courts and have participated as *amicus curiae* in cases before this Court involving issues of importance to educators. *See, e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009); *Forest Grove Sch. Dist.* v. *T.A.*, 523 F.3d 1078 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 987 (2009) (Case No. 08-305); *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291 (2006); *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Morse* v. *Frederick*, 551 U.S. 393 (2007); *Schaffer* v. *Weast*, 546 U.S. 49 (2005); *Bd. of Educ. of Okla. City Pub. Sch.* v. *Dowell*, 498 U.S. 237 (1991).

The education of English language learners ("ELLs") is one of the most important issues currently faced by *amici*. The United States has recently experienced the "greatest surge in immigration since the early 20th century." *Remade in America: The Newest Immigrants and Their Impact*, N.Y. Times, March 15, 2009, at A16. As a result, there are more than 5 million students in the Nation's public schools who are non-native English speakers. *See* Ginger Thompson, *Where Education and Assimilation Collide*, N.Y. Times, March 15, 2009, at A1. Approximately, one in ten students is an ELL. *Id.* In Arizona, 14 percent of public school students are ELLs. *See* Debra K. Davenport, State of Arizona Office of the Auditor General, *Baseline*

Study of Arizona's English Language Learner Programs and Data Fiscal Year 2007, at i (Apr. 2008). Moreover, as immigration patterns have changed in the last decade, school districts throughout the Nation in communities that previously did not have significant numbers of language minority students now are faced with issues that states like Arizona, California, and Texas have addressed for many years. *See* Thompson, *supra*, at A1. At the same time that the number of ELL students is dramatically increasing and immigrants are spreading throughout the country, state, federal, and locally initiated education reform efforts also have raised the expectations for school districts, administrators, teachers, and students. *Id.* *Amici* all embrace these daunting challenges.

NSBA, ASBA, AASA, NEA and AEA strongly believe that public schools must provide comprehensive programs to serve the special needs of ELL students and must provide equal opportunity to all students, regardless of their primary language. To this end, *amici* support the vigorous enforcement of the Equal Educational Opportunity Act of 1974, 20 U.S.C. §§ 1701 *et seq.* ("EEOA"). They further believe that all levels of government must provide adequate funding for instructional materials, resources, and programs for ELL students, including professional development for education employees who work with such students.

Arizona students, like those throughout the Nation, now come to public schools speaking many different primary languages, including Spanish, Navajo, Vietnamese, and many others. *Amici* believe that programs that effectively promote English

acquisition are vital to providing these students an equal opportunity to learn. The State of Arizona's persistent failure to provide even minimally adequate funding and support for the education of English language learners violates the EEOA. The court below correctly recognized that Arizona's ELL students deserve and are entitled to an opportunity to succeed—not a continuing legacy of neglect.

INTRODUCTION

This Court has long recognized "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982). "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all" and "has a fundamental role in maintaining the fabric of our society." *Id.* And there can be no dispute about the "significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Id.*

In 2000, the District Court for the District of Arizona ruled that Arizona was violating the EEOA because the State's funding for English language instruction for non-native speakers bore no rational relationship to the incremental cost of educating ELL students. Pet. App. 10a-15a. It issued an injunction compelling compliance with the EEOA. In 2006, one named defendant—the Superintendent of Public Instruction—and two intervenors—the Speaker of the Arizona House and the President of the State Senate—sought relief from that injunction. The State of Arizona and the Arizona State Board of Education, however, did not contest the injunction

because they acknowledged that the State remained out of compliance with the EEOA. Pet. App. 4a-5a, 28a.

When the District Court held a hearing, the evidence showed that the State had shifted to a different method of teaching ELL students—Structured English Immersion ("SEI")—and had enacted statutes providing for the *possibility* that some small amount of additional monies might be appropriated, although that has not happened. Even these provisions, however, would allow school districts to receive much of the ELL funding for a maximum of only two years per student, an arbitrary limitation given the fact that most ELL students require more time to master English. Pet. App. 103a, 106a-109a. The trial court found no cause to lift the injunction: The State still had not complied with the court's order and had instead implemented an ELL program that violated the EEOA in a number of ways. Pet. App. 113a-116a. Compliance would occur when the State put in place a funding system that did not violate federal law and that "rationally relates funding available to the actual costs of all elements of ELL instruction." Pet. App. 111a.

The Ninth Circuit affirmed. It found no abuse of discretion in the District Court's conclusion that Arizona's level of ELL funding bore no rational relationship to the costs of providing meaningful educational opportunities to students with limited English proficiency. Pet. App. 64a-67a. Arizona's funding for the incremental cost of educating ELL students continued to be arbitrary and capricious because it bore no rational relationship to the actual

costs or time involved in ensuring that ELL students have meaningful and equal access to the educational program offered. Pet. App. 97a.

The court of appeals also rejected Petitioners' novel theory that the No Child Left Behind Act of 2001 ("NCLB"), Pub. L. No.107-110, 115 Stat. 1425, eliminated the students' rights under the EEOA. *See* Pet. App. 72a-80a; *see also* Pet. App. 73a n.42 (noting belatedness of Petitioners' argument).

SUMMARY OF ARGUMENT

This case presents the question whether the EEOA continues to provide ELL students with the educational rights initially recognized by the Office for Civil Rights in its 1970 memorandum and subsequently ratified and enforced by this Court in *Lau* v. *Nichols*, 414 U.S. 563 (1974). Petitioners assert that the EEOA was effectively repealed when Congress enacted NCLB. Not so.

The EEOA permits Arizona to adopt whatever method of teaching ELL students English that it wants—including the controversial SEI approach that it adopted in 2006—so long as that method provides ELL students with a meaningful opportunity to participate in the school's educational program. But the State also must provide school districts and teachers with the resources necessary to implement its chosen approach. *See Castaneda* v. *Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981). If the Court does not require at least this, it will effectively be endorsing the do-nothing approach rejected decades ago in *Lau*.

The federal courts play a unique role in enforcing the EEOA and other civil rights laws enacted over

the past five decades to ensure equal educational opportunities. This special and longstanding role includes ensuring non-discriminatory treatment for minority groups, including language minority students. It is well-settled, moreover, that judicial remedies for constitutional and federal statutory violations may affect the manner in which state and local governments manage and fund public education systems. With ELL populations growing in more states and school districts nationwide, this would be a particularly inopportune time for the Court to abdicate its crucial responsibility in this regard.

Petitioners attempt to evade the District Court's clearly correct factual finding that Arizona fails to provide local school districts with the resources necessary to effectively assist ELL students in learning English and gaining meaningful access to the regular curriculum by distorting the relationship between NCLB and both the EEOA and Title VI of the Civil Rights Act of 1964. While NCLB changed the accountability standards for receipt of certain federal funds by requiring states to annually assess and report student progress toward academic proficiency, nothing in that Act suggests it was intended to change the EEOA in any way. To the contrary, NCLB focuses on measuring educational outcomes, while the EEOA addresses educational inputs, requiring states and school districts to take appropriate action to ensure that students facing language barriers have meaningful access to the school curriculum.

Neither Petitioners' disingenuous invocation of local control nor their distortion of NCLB should

cloud the issue: Arizona's funding failures violate the EEOA.

ARGUMENT

I. ARIZONA'S INADEQUATE FUNDING OF EDUCATIONAL PROGRAMS FOR ENGLISH LANGUAGE LEARNERS VIOLATES THE EEOA.

A. Arizona Fails To Provide Local School Districts With The Resources Necessary For ELL Students To Overcome Language Barriers.

1. Petitioners' intimation to the contrary notwithstanding, this case simply does not implicate Arizona's right to choose an instructional method or set educational policies for its ELL students, nor would an affirmance encourage district courts to improperly interfere in those decisions. Speaker of the Arizona House of Representatives and President of the Arizona Senate Petitioners' Br. ("Speaker Pet'rs Br.") at 1, 7, 28, 31, 33. This litigation for years has instead sought to ensure adequate funding under the EEOA for the State's chosen instructional method.[2]

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[2] After declaring it the policy of the United States that "all children enrolled in public schools are entitled to equal educational opportunity," 20 U.S.C. § 1701, the EEOA provides in pertinent part:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
> * * * (f) [failing] to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

While Arizona adopted a highly controversial method of instruction when it passed H.B. 2064 in 2006, that is the State's prerogative under *Castaneda*, 648 F.2d at 1009. SEI is now the State's instructional method. *See* Ariz. Rev. Stat. § 15-751(5). As the State defines it, SEI is an English language acquisition process in which nearly all classroom instruction is in English, but the curriculum and presentation are designed for children who are learning the language. Although there is disagreement over the relative efficacy of SEI,[3] whether SEI is based on a sound educational theory is not at issue in this case, and both the Fifth Circuit in *Castaneda* and the District Court here correctly recognized that the EEOA "leave[s] state and local authorities a substantial amount of

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Id. § 1703. It expressly grants a private right of action to "[a]n individual denied an equal educational opportunity." *Id.* § 1706; *see also Castaneda*, 648 F.2d at 1009 (The EEOA "grant[s] limited English speaking students a private right of action to enforce that obligation.").

[3] *See, e.g.*, Stephen Krashen *et al.*, *Review of "Research Summary and Bibliography for Structured English Immersion Programs" of the Arizona English Language Learners Task Force* 3 (Oct. 2007), *available at* http://www.asu.edu/educ/sceed/azell/review.doc; Ariz. Ass'n for Bilingual Educ., *Be An Informed Voter; Some Facts About Bilingual Education In Arizona*, (2006) (citing statistics from the Arizona Department of Education), *available at* http://azbilingualed.org/ AZ%20Hist-ALEC/flyer2.rtf; American Federation Of Teachers, *Where We Stand: English Language Learners* 9 (2006); Kellie Rolstad, *et al.*, *Weighing the Evidence: A Meta-analysis of Bilingual Education in Arizona*, 29 Bilingual Research J. 43, 43-67 (Spring 2005); *A Synthesis of Research of Reading Instruction for English Language Learners*, 75 Rev. of Educ. Research 247 (Summer 2005).

latitude in choosing the programs and techniques." *Castaneda*, 648 F.2d at 1009.

The obligations of states and school districts under the EEOA, however, do not stop with the mere selection of an approach. In addition to being based on sound educational theory, an ELL program must be adequately funded, among other things to provide appropriately trained personnel to implement the program, and must undergo periodic evaluations of its effectiveness. *See Castaneda*, 648 F.2d at 1009-10; *see also* Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency, United States Dep't of Educ. (Sept. 27, 1991) (explaining that *Lau* compliance reviews look to whether students with limited English proficiency have "meaningful" and "equal" access to the school's programs; explaining that the Department applies the standard articulated in *Castaneda*, 648 F.2d 989).[4]

2. Although the State has the right under the EEOA to choose its own ELL instructional method, it must fund that instruction at a meaningful level. *Castaneda*, 648 F.2d at 1010. Arizona's ELL funding levels, however, are far lower than SEI instruction requires. The trial court found that the State's funding for non-native speakers was "not reasonably calculated to effectively implement the educational theory" that the State had approved, and this factual finding is unassailable. Pet. App. 147a.

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[4] *Accord Gomez* v. *Ill. State Bd. of Educ.*, 811 F.2d 1030, 1041 (7th Cir. 1987) (following *Castaneda* framework); *Teresa P.* v. *Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 713 (N.D. Cal. 1989) (same); *Keyes* v. *Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1510 (D. Colo. 1983) (same).

At the eight-day hearing held by the District Court, five different Arizona school districts provided evidence that their current ELL instructional costs ranged between $1,570 and $3,300 per pupil. Arizona also conducted its own studies in 2004, relying in part on panels of State and national experts. The national expert panel recommended a range of spending, based on the degree of a student's need for help and grade level, from $1,026 per pupil for low-need students at the high school level to $2,571 for high-need elementary school students. The State expert panel recommended spending $1,785 in per pupil incremental costs in grades K-2, and $1,447 in grades 3-12. Pet. App. 19a.

Arizona, however, currently provides only about $340 per ELL student, and would only provide $450 under H.B. 2064. Pet. App. 22a.[5] These amounts are from one-sixth to one-half of what the State's own experts recommended. Pet. App. 19a. In fact, Arizona's cost study from 20 years ago showed that even then, ELL instruction required more than $450 in incremental expenditures per student—well over $1000 in today's dollars. Pet. App. 149a, 177a-178a. By any measure, Arizona's current funding levels are insufficient to "ensure that [ELL] students are achieving mastery of the State's specified 'essential skills.' " Pet. App. 17a.[6]

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[5] H.B. 2064 expressly conditions this minor increase on a finding that it constitutes "appropriate action" under the EEOA. H.B. 2064 § 15(A).

[6] In addition to the cost of per-pupil instruction, Arizona also requires school districts to test ELL students' English proficiency at least once a year and to submit the test result

3. In addition, Arizona's two-year limit on ELL-funding also is arbitrary and capricious because most ELL students need more than two years to achieve English proficiency, a fact that is uncontestable on this record. All of Arizona's per-pupil ELL funding stops once a student has been classified as an ELL for two years, regardless of whether that student has reached English proficiency. As the Ninth Circuit correctly observed, "there is absolutely no evidence in the record to support the proposition that a student's need for ELL programs invariably vanishes after two years of instruction: Instead the evidence is squarely to the contrary." Pet. App. 84a-85a.

Most ELL students do not achieve proficiency in two years.[7] Even Petitioners' expert witness stated that "some children will certainly require more time" than two years to become proficient in English. Pet. App. 109a. Other witnesses confirmed that data for ELL students in specific Arizona school districts show that ELL students take more than two years to become proficient; in Nogales, for example, students take, on average, between four and five years to become proficient in English. Pet. App. 108a. In Tucson, the average is 4.6 years. *Id.* at 45a.

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data to the State. No State funding is provided to support the performance of these tasks.

[7] *See, e.g.*, Testimony of Michael A. Resnick, Associate Executive Director, National School Boards Association, Before the House Comm. on Educ. & Labor, Discussion Draft of No Child Left Behind Reauthorization (Sept. 10, 2007) ("For determining AYP, the bill should recognize research findings that ELL students frequently take four to seven years to become proficient in 'academic English,' the language skills needed in the classroom.").

A recent study of six Arizona school districts found that, after two years in ELL programs, only 22.3 percent of students were English proficient. After four years, only 32.4 percent of students were English proficient. Ariz. Ctr. for Pub. Pol'y, *What Does Arizona's ELL Population Look Like, and How Are They Doing?* 5 (June 2006). Thus, the vast majority of Arizona's ELL students—more than three-quarters of them—take more than two years to reach English proficiency. Arizona's two-year cut off of ELL funding clearly bears no rational relationship to effective implementation of the State's chosen method of ELL instruction.

4. In addition to drastically underfunding ELL education in Arizona and arbitrarily cutting off access to even the limited funding provided, the State also creates additional financial problems for school districts, because its funding scheme blatantly violates several provisions of federal education law and thus endangers federal aid to both the State and local school districts.

Federal law prohibits a school district from using Title I, IIA, III and Impact Aid monies to reduce the amount of money it receives from other sources. *See* 20 U.S.C. §§ 6314(a)(2)(B), 6623(b), 6825(g), 7709(a)(1)(B). Furthermore, the law applying to all of the pertinent federal grant programs provides that "[a] State shall not take into consideration payments under this chapter * * * in determining the eligibility of any [school district] in that State for State aid, or the amount of State aid, with respect to free public education of children." 20 U.S.C. § 7902.

Arizona directly violates these anti-supplanting laws by requiring school districts to reduce their

requests for State ELL funding by a percentage of the federal funding they receive. *See* Ariz. Rev. Stat. §§ 15-756.01(I)(1)-(3), 15-756.11(E). Under federal law, however, even if a school district does or can use some federal money for ELL programs, the State cannot legally reduce its funding of ELL instruction based on the federal funds. *See, e.g.*, 20 U.S.C. § 7902. During the District Court's evidentiary hearing, the State's own expert, a 29-year veteran of the United States Department of Education, testified that he had "never seen such a blatant violation" of federal anti-supplanting laws. Pet. App. 106a.

B. Educational Research Supports The Ninth Circuit's Determination That Arizona's ELL Students Require Additional Resources.

Regardless of which estimate in the record the Court relies upon, it is indisputable that educating ELL students requires some additional resources and that Arizona's funding falls far short of even the lowest estimates of necessary per-pupil expenditures. Petitioners, however, suggest that Arizona's current shortfall in ELL funding has become immaterial because "broad evidence" supposedly shows that "significantly expanding financial resources" does not help American schoolchildren. Speaker Pet'rs Br. 9. This claim is both false and irrelevant.

First, Petitioners grossly misstate the current state of research regarding school funding. While there is an active debate among researchers regarding the extent to which resources matter, there is a consensus directly contrary to what Petitioners assert: There is no question that at some level, resources do matter.

Second, Petitioners' argument is also irrelevant because none of the cases or studies they cite addresses the unique instructional needs of ELL students. Finally, even if general educational theory had changed and it was established that appropriate educational resources make no difference in teaching English to ELL students, such a generic shift in social science consensus would not constitute changed circumstances under Rule 60(b).

1. Scholars largely agree that educational resources do matter. Since the 1960s, substantial academic research and judicial analysis has overwhelmingly debunked the notion that additional resources do not matter for educational results.

Back then, an influential sociologist, James Coleman, posited that money spent on education to raise children out of poverty had little effect. *See* United States Department of Health, Education, and Welfare and United States Office of Education, *Equality of Educational Opportunity* (1966). In the years since then, however, numerous scholarly works have highlighted significant methodological flaws in Coleman's analysis. *See* Michael A. Rebell & Joseph Wardenski, *Of Course Money Matters: Why the Arguments to the Contrary Never Added Up* at 9, Campaign for Fiscal Equity, Inc. (Jan. 2004), *available at* http://www.cfequity.org/MoneyMatters Feb2004.pdf; *see also* Bruce J. Biddle & David C. Berliner, *What Research Says About Unequal Funding for Schools in America* at 6, Arizona State University Education Policy Reports Project (Winter 2002) (discussing major errors in Coleman's report) *available at* http://epsl.asu.edu/eprp/EPRP_2002_ Report.htm.

Hundreds of additional studies also have demonstrated the effects of school-system inputs (such as additional funding) on school-system outputs (educational results). *See* Helen F. Ladd & Janet S. Hansen, eds., *Making Money Matter: Financing America's Schools* 140-141 (Nat'l Research Council 1999). Petitioners, however, rely on the work of a single economist, Eric Hanushek, as educational gospel, misusing Hanushek's work to argue that there is no point in providing additional resources to ELL students in Arizona because greater resources would not improve results. *See* Speaker Pet'rs Br. 9, 47.[8] However, several economists and researchers have strongly questioned Hanushek's methodologies and findings and have reached the opposite conclusion: Resources do matter for student achievement. *See* Biddle, *What Research Says About Unequal Funding for Schools in America*, *supra*, at 6-7; *see also* Ladd, *Making Money Matter*, *supra*, at 142-143; Gary Burtless, *Does Money Matter? The Effect of School Resources on*

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[8] Even Hanushek himself, although finding no systematic relationship between spending per pupil and student performance, has not interpreted his findings to mean that additional school resources could *never* be effectively used to improve performance. *See, e.g.*, Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, The Economic Journal (Feb. 2003) ("It is important to understand what is and what is not implied by this conclusion [that no systematic relationship exists]. First, it does not mean that money and resources *never* matter. There clearly are situations where small classes or added resources have an impact.") (emphasis in original); *see also* Burtless, *Does Money Matter?*, *supra*, at 22; Rebell, *Of Course Money Matters*, *supra*, at 12-13. Hanushek concedes that researchers in some cases have convincingly shown that additional resources were used effectively to obtain better results. Burtless, *Does Money Matter?*, *supra*, at 22.

Student Achievement and Adult Success at 9, 15 (Burtless, ed. 1996).

Among other critiques, scholars have pointed out that Hanushek's methods introduce bias and rely on inaccurate proxies when attempting to understand, for example, the importance of class size. *Id.*; *see also* Ladd, *Making Money Matter*, *supra*, at 142-143. Those scholars who have corrected for these errors have found that, contrary to Hanushek's conclusions, "the relationship between resources and student achievement is significant and generally large." *Id.* at 143; *see also* Biddle, *What Research Says About Unequal Funding for Schools in America*, *supra*, at 7 (citing the work of economist Alan Krueger finding a positive relationship between reduced class size and student achievement after accounting for biases in Hanushek's work).

Petitioners also incorrectly suggest that NCLB represents the validation of their imagined consensus that educational resources are irrelevant. To the contrary, increased federal funding was a cornerstone of the legislative compromise leading to the enactment of NCLB. As one of the Act's key sponsors explained:

> The new education reform bill * * * placed substantial new demands on local schools, teachers, and students. Students will be tested on more challenging curricula and schools and teachers will be held accountable for results. But schools cannot achieve high standards on low budgets. We have an obligation to match new education reforms with new resources.

Statement of Sen. Kennedy, Sen. Hearing 107-479 Before the Sen. Comm. on Health, Education, Labor, & Pensions at 9 (May 23, 2002) (referring to NCLB).

2. Even if there were some consensus that, generally, educational resources do not matter, it would be irrelevant to this case. Here, the evidence underlying the District Court's findings relates to the cost of particular services for ELL students. The studies relied upon by Petitioners in this Court do not specifically address ELL students at all.

Moreover, even if Petitioners' theory about educational resources not affecting educational outcomes were correct as to ELL instruction or a recent phenomenon—neither of which is true—such a change in educational theory would not constitute changed circumstance under Rule 60(b)(5). Petitioners failed to prove in the District Court that some changed circumstances in Arizona today make educational resources irrelevant to ELL education. As the Ninth Circuit recognized, Arizona refused to prepare and adopt a study of ELL costs even though it had been ordered to do so by the District Court. Pet. App. 56a.

Under Rule 60(b), if Petitioners wished to present an educational theory and evidence to suggest that funding *was* adequate, as it stood or under HB 2064, the District Court was the appropriate place to present that evidence. Petitioners did not do so, and the District Court found, based on the evidence before it, that the level of funding Arizona provided "was not reasonably calculated to effectively implement" the State's chosen ELL educational theory. Petitioners' new and misleading discussion

of general theories of education funding provides no basis for disturbing this finding.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH OUR NATION'S TRADITION OF LOCAL CONTROL OF PUBLIC EDUCATION.

This Court has repeatedly underscored the importance of locally elected school boards in guiding the fates of students within their districts. *See Milliken* v. *Bradley*, 418 U.S. 717, 741-742 (1974) (noting that "no single tradition in public education is more deeply rooted than local control over the operation of schools"); *see also Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410 (1977) (stating that "local autonomy of school districts is a vital national tradition"). Petitioners, however, pervert the idea of local control in arguing that the federal courts may not require states to comply with federal civil rights laws if such compliance costs money. The tradition of local control does not justify allowing state entities to abdicate their statutory obligations. Rather, it requires both state and local entities to remain responsive to their constituents and to comply with federal law in a manner that respects the interests of local communities.

A. The Federal Courts' Longstanding Interpretation Of The EEOA Gives Local Authorities Ample Discretion.

Mindful of federal courts' obligation "to fulfill the responsibility Congress has assigned to us without unduly substituting our educational values and theories" for that of state or local authorities, the *Castaneda* framework was designed to provide states

with ample discretion in crafting special programs for ELL students. 648 F.2d at 1009. Under this longstanding precedent, the authority of states and local school districts is appropriately broad.

In examining "the soundness of the educational theory" adopted by a state or school district, federal courts are not concerned with "discerning the relative merits of sound but competing bodies of expert educational opinion, for choosing between sound but competing theories is properly left to the educators and public officials charged with responsibility for directing the educational policy of a school system." *Id.* Thus, while Arizona has adopted a highly controversial method of educating ELL students (*supra* II.A.1.), other states, such as Texas, have opted for bilingual education programs. *See* Tex. Educ. Code § 29.053. Federal courts will not question the wisdom of a state's selected method, so long as the method is not a sham or has not proven to be a failure. *Castaneda*, 648 F.2d at 1010. Indeed, the *Castaneda* court refused to find that a school system failed to fulfill its statutory obligations because it opted to "focus first on English language development and later [provide] students with an intensive remedial program to help them catch up in other areas of the curriculum." *Id.* at 1011-12. The court held that schools were free "to determine the sequence and manner in which limited English speaking students" are taught, provided that the program was reasonably calculated to remove language barriers within a reasonable length of time. *Id.*

In short, the federal courts' consistent interpretation of the EEOA is carefully calibrated to

respect—rather than to abrogate—local control. The courts have recognized that "Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA." *Id.* at 1009. Yet, Congress "deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met." *Id.*

B. Arizona's Failure To Adequately Fund Its Chosen Method Of Education For ELL Students Makes A Mockery Of The Idea Of Local Control.

As discussed above, *supra* II.A, Arizona's failure to adequately fund the method that it has chosen for ELL instruction gives local school districts and teachers an impossible task: Educate a growing population of non-native speakers without adequate resources or training. School districts must find meaningful ways to teach these students under the EEOA, and under NCLB they will be held accountable for any failure to do so effectively. Yet, Petitioners claim the State has no responsibility to provide them with the necessary tools to do the job. This is a strange notion of "local control."

Our Nation's tradition of local control of public education is first and foremost about enabling local school boards to respond to the needs of their students, parents, and communities. This Court has extolled the virtues of local control as it "affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for

educational excellence.'" *Milliken* 418 U.S. at 742. As residents of the communities they serve, school board members have unique expertise about the curricular, human, and financial resources necessary to educate *their* students. Arizona's school boards, administrators and teachers know what their ELL students need, and the State is not providing resources adequate to the task.

Under Arizona law, ELL students must be instructed in English across all academic subject areas. To ensure that substantive subject areas—such as science, history, social studies, and math—have *any* meaning to students with limited English-proficiency, ELL students must be taught using SEI. Teachers must be specially trained in this method and must continue to receive training after obtaining their initial SEI certification. Simultaneously, schools must provide "English as a Second Language" ("ESL") instruction to teach ELL students to speak, read, and write in the English language. Based on their expertise, school districts have determined that the most effective ELL programs provide students with properly certified and trained ESL and SEI teachers and teachers aides, devote a substantial amount of time each day to ESL instruction by ESL-certified teachers, and maintain smaller SEI classrooms to provide ELL students with an adequate level of individualized attention. Without such resources, school boards, administrators, and teachers all fear that ELL students will be condemned to "classroom experiences wholly incomprehensible and in no way meaningful." *Lau*, 414 U.S. at 566.

The District Court did nothing more than require Arizona to provide local districts with the means of effectively implementing the method of ELL instruction mandated by the State itself. Moreover, not only did the District Court defer to Arizona's chosen method of ELL instruction, but it also tailored its limited remedy to fit the overall education funding scheme adopted by the State. For example, Arizona's Constitution requires a system for equalizing school funding so that local school districts with lower tax bases do not fall too far behind more affluent districts. *See* Ariz. Const. art. XI, § 1; *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997). The lower court's approach mirrors this State policy decision by requiring that Arizona ensure local districts have the ability to meet minimum State-wide standards for ELL instruction.

Rather than acknowledge that local school districts require additional resources to implement the State's chosen method of ELL instruction, Petitioners suggest that any increase in per-pupil ELL funding would somehow "create perverse incentives for schools to keep ELL students languishing in special-language programs." Speaker Pet'rs Br. at 64. Petitioners' suggestion is absurd. As discussed above, Arizona itself mandates SEI, and not separate language programs, as the instructional approach for ELL students. In addition, NCLB imposes sanctions on schools and school districts whose ELL students do not make adequate yearly progress. Third, Arizona currently provides only a small fraction of the per-pupil ELL funding actually needed. Fourth, Arizona provides

very low overall education funding compared to other states.[9]

The inadequacy of resources to meet the needs of Arizona students is thus the true "flinty reality" facing the State's local school districts. Speaker Pet'rs Br. 47. Some districts will scrape by with the bare minimum in ELL funding. Others will continue to make the difficult decision to spend funds on ELL instruction that would have otherwise been allocated to general educational services. Both scenarios are potentially devastating for Arizona's school districts and the children they serve. And neither provides *any* "incentive" for school districts to keep their students in ELL classes a moment longer than necessary. Nor would either scenario provide a sustainable method of achieving or maintaining legal compliance or educational success.

Finally, Petitioners' arguments about local control are also ironic, since the Petitioners are not in fact the appropriate representatives of the State of Arizona. The legislative representatives are precluded by the Arizona Constitution from representing the State's interests in litigation. *See State ex rel. Woods* v. *Block*, 942 P.2d 428, 434-37 (Ariz. 1997). Likewise, the State Superintendent's position conflicts with that of both the State itself and the Arizona State Board of Education. Thus,

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[9] In fact, according to a 2007 report from the United States Department of Education, Arizona ranks 50th out of the 50 states and the District of Columbia in per pupil expenditures. *See* National Center for Educational Statistics, *Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2006-2007* at 14 (Fiscal Year 2007), *available at* http://nces.ed.gov/pubs2009/ 2009337.pdf.

while Petitioners attempt to drape themselves in the honorable mantle of "local control," they not only have taken positions directly contrary to the interests of locally elected school boards throughout Arizona, but also are not even appropriate representative of the State's interests.

C. The Federal Courts Have An Important Role In Protecting Meaningful Local Control.

While state and local authorities have primary authority over education funding decisions as well as educational policies, Petitioners are wrong to suggest that federal courts are powerless to ensure effective remedies for constitutional or statutory violations whenever those remedies may cost money. This Court has consistently rejected such arguments.

The federal courts' power to direct states to fund court-ordered remedies has been most clearly articulated in the school desegregation context. One of the strongest statements in this regard was made in the early case of *Griffith* v. *County School Board*, 377 U.S. 218, 233 (1964), where the Court invalidated a school district's scheme to evade the desegregation mandate of *Brown* v. *Board of Education* by closing down all of its public schools and using public funds to support private schools open only to white students. The Court held that the district court had the power to order the county to operate and fund a full public school system:

> The District Court[ ] may if necessary to prevent further racial discrimination, require the [county] Supervisors to exercise the power * * * to reopen, operate, and maintain without racial

> discrimination, a public school system in Prince Edward County, like that operated in other counties in Virginia. [*Id.* at 233.]

Similarly, in *Milliken* v. *Bradley*, 433 U.S. 267 (1977), the Court again upheld the power of the federal district courts to impose funding obligations on state and local authorities: "Federal courts [may] enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Id* at 289.

Today the task of effectively educating growing populations of English language learners is as challenging and significant as was the job of remedying the decades of discrimination against African American students. Both the growing population of non-native speaking students and the Nationwide diaspora of ELLs make this responsibility among the most critical educational challenges faced by local school boards, administrators and teachers. In light of these challenges, this Court should not abdicate the established role of the federal courts in supporting meaningful local control with respect for educational and civil rights.

III. NCLB DID NOT REDUCE OR ABOLISH THE LEGAL PROTECTION THE EEOA AFFORDS TO ENGLISH LANGUAGE LEARNERS.

Petitioners resort to distortion in an attempt to evade the District Court's clearly correct factual finding that Arizona fails to provide local school districts with the resources necessary to effectively

assist ELL students in learning English and gaining meaningful access to the regular curriculum. They argue that NCLB defines the parameters of "appropriate action" under the EEOA. *See, e.g.*, Speaker Pet'rs Br. 51-55. But NCLB does not change in any way the protections offered to Arizona school children by the EEOA.

A. NCLB And The EEOA Have Very Different Purposes.

1. The EEOA is "a statute guaranteeing the civil rights of individual students," including English language learners. *United States* v. *Texas*, 572 F. Supp. 2d 726, 762 (E.D. Tex. 2008). It was enacted to codify both an administrative guidance from the Office for Civil Rights and a ruling by this Court: (1) in 1970, the Office for Civil Rights ("OCR") promulgated a Memorandum construing Title VI to require school districts to take "affirmative steps" to ensure that their instructional programs are open to students who otherwise would be excluded from effective participation in the districts' educational programs because they lack English language skills, *see* Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970), and (2) in *Lau*, this Court held that it violates Title VI for States and school districts to deny students who are English language learners "a meaningful opportunity to participate in the [school district's] educational program." 414 U.S. at 568. *See also* Pet. App. 8a; *Castaneda*, 648 F.2d at 1008 (noting that the EEOA codifies the "essential holding of *Lau*, *i.e.*, that schools are not free to ignore the need of limited English speaking children for language assistance to

enable them to participate in the instructional program of the district").

To ensure that "all children enrolled in public schools are entitled to equal educational opportunity," 20 U.S.C. § 1701, the EEOA prohibits states from "[failing] to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." *Id.* § 1703. Confirming the individual rights at issue in the EEOA, Congress expressly granted a private right of action to "[a]n individual denied an equal educational opportunity." *Id.* § 1706. The EEOA thus is an individualized civil rights statute requiring school districts to offer ELL students equal educational opportunities.

2. While the EEOA focuses primarily on the "inputs" to a student's education that states and local school districts must provide, the NCLB, by contrast, focuses principally on "outputs"—specifically the percentage of students in various demographic groups that achieve proficiency on state standardized tests. One of the sub-groups measured under NCLB is ELL students. 20 U.S.C. § 6812(8) (explaining that the purpose of the statute is to hold states and school districts "accountable for increases in English proficiency and core academic content knowledge of limited English proficient children by requiring—(A) demonstrated improvements in the English proficiency of limited English proficient children each fiscal year; and (B) adequate yearly progress for limited English proficient children * * *"). Even Petitioners recognize this distinct focus. *See* Speaker Pet'rs Br. 13 (NCLB does not focus on "schooling inputs" but instead on "outputs" like requiring States

and local schools to meet "objective, measurable student performance standards"). NCLB's principal purpose is to allow the federal government to measure the effectiveness of its investment in education and provide some sanctions to promote accountability.

The Ninth Circuit correctly recognized the different purposes of NCLB and EEOA and the corollary that flows from those distinct purposes: EEOA "is an equality-based civil rights statute, while [NCLB] is a program for overall, gradual school improvement. Compliance with the latter may well not satisfy the former." Pet. App. 72a-73a. While NCLB addresses the outcomes achieved for all students in part with federal resources, EEOA addresses the services that students with limited English proficiency are entitled to receive and empowered to enforce.

NCLB also does not focus on individual rights to an equal educational opportunity, as does the EEOA. Every court to address the matter has concluded that there is no private right of action at all under NCLB. *See Newark Parents Ass'n* v. *Newark Pub. Sch.*, 547 F.3d 199, 204-214 (3d Cir. 2008); *Alliance for Children* v. *City of Detroit Pub. Sch.*, 475 F. Supp. 2d 655, 658-660 (E.D. Mich. 2007); *Fresh Start Acad.* v. *Toledo Bd. of Educ.*, 363 F. Supp. 2d 910, 914-917 (N.D. Ohio 2005); *Ass'n of Cmty. Orgs. for Reform Now* v. *New York City Dep't of Educ.*, 269 F. Supp. 2d 338, 343-348 (S.D.N.Y. 2003).

NCLB has an entirely different kind of enforcement mechanism: It provides for federally funded grants to states with federal government approved plans to benefit ELL students, so long as the grantees meet

"annual measurable achievement objectives * * * includ[ing] * * *making adequate yearly progress for limited English proficient children." 20 U.S.C. §§ 6821-26, 6842. As the court below aptly articulated, "this very gradual improvement plan does not set as an objective immediate equalization of educational opportunities for each such student"; it merely "packages federal grants with discrete, incremental achievement standards as part of a general plan gradually to improve overall performance." Pet. App. 74a.

3. The EEOA, as well as Title VI, complement NCLB by offering a rights-based framework focused on the minimum opportunities that states and school districts must offer immediately. These statutes provide ELL students the right to ensure that the schools they attend take "appropriate action" from the outset to eliminate language barriers for ELL students, and they require fair treatment for language minority students. Thus, to state a claim for an EEOA violation, ELL student-plaintiffs must allege that they "face language barriers, that the services provided to address these barriers are deficient, and that LEP [limited English proficient] students are consequently prevented from enjoying full and equal participation in instructional programs." *Leslie* v. *Bd. of Educ. for Ill. Sch. Dist. U-46*, 379 F. Supp. 2d 952, 960 (N.D. Ill. 2005).

In interpreting Title VI in *Lau*, this Court emphasized that because "[b]asic English skills are at the very core of what these public schools teach," "those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful." 414

U.S. at 566. To prevent such meaningless and unintelligible educational experiences, numerous courts have recognized that the EEOA and *Lau* require school districts to provide special programs for ELL students that afford them the opportunity for meaningful participation in the school's educational program. Specifically, such programs must be: (1) based on sound educational theory; (2) supported by adequate resources; and (3) periodically evaluated. *See Castaneda*, 648 F.2d at 1009-10.

The third *Castaneda* factor—the periodic evaluation of a program's effectiveness—is the only place where there is an actual intersection between the two laws: The outcome data from NCLB may provide valuable information about whether appropriate actions have been taken. *See* Pet. App. 80a n.46 (noting that compliance with NCLB may be "somewhat probative" of EEOA compliance). But this is the only actual interplay that occurs between these two very distinct statutes.

B. Nothing In The Text Or Legislative History Of NCLB Suggests It Was Intended To Amend Or Abolish The EEOA Or Disturb This Court's Ruling In *Lau*.

Petitioners read the NCLB to repeal by implication both the EEOA and *Lau*, and they urge the Court to hold that NCLB, *sub silentio*, defines the parameters of "appropriate action" for EEOA compliance. Speaker Pet'rs Br. 52-54. The threshold problem with this argument is that "[i]t is simply not plausible that Congress intended to repeal" the rights of ELL students to seek meaningful access to education programs "*sub silentio* by the very Act it

passed to strengthen the Government's hand" in ensuring increased accountability for the educational outcomes for ELL students. *Cook County, Ill.* v. *U.S. ex rel. Chandler*, 538 U.S. 119, 133-134 (2003).

Congress presumably is well aware of "the general rule that repeals by implication are disfavored," *Hagen* v. *Utah* 510 U.S. 399, 416 (1994), yet it gave absolutely no indication that it intended to repeal the EEOA's protections for ELL students. The far more logical reading of the two statutes is that one addresses the access in place on the front end and one addresses the results on the back end: The EEOA requires that a school district have programs in place to ensure meaningful and equal access for ELL students, while NCLB requires measurement of the effectiveness of the programs in terms of whether groups of students, schools and school districts make "adequate yearly progress" ("AYP") towards 100 percent proficiency.

Petitioners' repeal by implication argument notably rests on nothing in the text or legislative history of NCLB. Indeed, the text of the statute actually supports Respondents because it makes clear that "nothing" in the statute relating to ELL student outcomes "shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847. Thus, the obligations enforceable under the EEOA, as well as under *Lau*, remain in full effect.[10]

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[10] NCLB also officially expired on November 30, 2007. While it was automatically extended in its current form until a reauthorization is passed or other legislative action is taken, it is unlikely to be reauthorized in its current form.

Nothing in the NCLB undermines, abrogates, or changes the legal obligation under the EEOA to take affirmative steps to ensure equal access for all students, including ELL students. The EEOA is concerned with the current rights of individual students; NCLB is concerned with ensuring gradual improvement over time at the school and district level. Pet. App. 75a. As the court below aptly recognized, these two statutes work together to ensure that "[a]n individual student whose needs are not being met under the EEOA need not wait for help just because, year after year, his school as a whole makes 'adequate yearly progress' towards improving academic achievement overall, including for ELL students." *Id.*

C. Petitioners' Bizarre Interpretation Of NCLB Would Undermine The EEOA And This Court's Ruling In *Lau*.

Petitioners' position is that, whenever a state submits a plan under NCLB that is approved by the United States Department of Education, thereby permitting federal funding to flow to the state, federal courts cannot find that the state or a local school district is failing to take "appropriate action" under the EEOA to ensure that ELL students have meaningful and equal access to academic programs. This turns the protections of the EEOA and *Lau*—protections afforded to *individual* students—on their head. Under Petitioners' theory, individual students no longer would have any right of access to a meaningful education. That is so because NCLB measures progress by *schools* and *school districts*, not by *individual* students. Thus, if an individual student is attending a school that is making

adequate yearly progress, the *individual* student would no longer be entitled to access to a meaningful education, but instead could be condemned to a classroom experience that is "wholly incomprehensible and in no way meaningful." *Lau*, 414 U.S. at 566.

Petitioners' approach also would permit states to require school districts to divert general education funding—thereby placing school district officials in the untenable situation of being able to provide a meaningful education for ELL students only by cutting aspects of the general education program available to all students. "In 2000, as today, ELL incremental costs *could* be covered by diverting basic educational support, hampering the state's ability to provide a basic education to all Arizona students." Pet. App. 70a. So, a State could underfund ELL programs and force a school district to choose between base level needs and ELL programs. *Id.* However, as Justice Powell acknowledged in a similar context, "[a]ny attempt to redistribute available resources will cause further deterioration in on-going educational programs and will merely result in robbing Peter to pay Paul." *Milliken* v. *Bradley*, 433 U.S. 267, 272 n.3 (1977) (J. Powell concurring) (quoting *Bradley* v. *Milliken*, 540 F.2d 229, 251 (6th Cir. 1976)). Such a "Hobson's choice" is far from acceptable under the EEOA or *Lau*.

The absurdity of Petitioners' argument about the primacy of NCLB can also be seen by comparing the EEOA with another federal education law with which this Court regularly grapples, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.* ("IDEA"). Petitioners claim that the NCLB

abrogates the rights of ELL students protected by the EEOA because NCLB requires states and school districts to test students facing language barriers. Applying this argument to the IDEA context, one would be compelled to conclude that the NCLB also abrogates the rights of disabled students protected by the IDEA because NCLB requires the testing of students with disabilities. Obviously, such a conclusion is irreconcilable with Congress' broad mandate set forth in the IDEA and this Court's numerous decisions enforcing that statute.[11] The same rationale applies with equal force to the EEOA.

Yet, Petitioners would have the Court declare that, so long as the State has an NCLB-approved plan for federal funding, ELL students who are being denied access to a meaningful educational program have no legal redress. The EEOA and *Lau* compel a contrary conclusion.

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[11] This Court has repeatedly addressed IDEA in the eight years since NCLB was enacted without once suggesting that NCLB had supplanted IDEA. *See, e.g., Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 291; *Schaffer*, 546 U.S. at 49.

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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